NO.09-35818 & 09-35826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants/Appellants,

and

WASHINGTON COALITION FOR OPEN GOVERNMENT,

Intervenors/Appellants.

On Appeal From The United States District Court
Western District Of Washington, At Tacoma
No. C09-5456 BHS
The Honorable Benjamin J. Settle, United States District Court Judge

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

On September 22, 2009, this Court issued an Order setting an expedited briefing schedule, and setting the case for oral argument on October 14, 2009. The Court should reverse the District Court's decision because there is no basis upon which to grant injunctive relief. After oral argument, the Court should stay the injunction so the Referendum 71 petitions may be disclosed before the November 3rd general election, when the voters will be considering Referendum 71.

II. ARGUMENT

A. The District Court Abused Its Discretion In Granting The Preliminary Injunction Based On Count I

Count I of the Sponsors' Complaint is a facial challenge to Washington's Public Records Act. ER 475. The District Court ruled that disclosing Referendum 71 petitions, which contained signers' names, and addresses, would violate the signers' First Amendment right to anonymous speech. This Court should reverse the District Court's decision.

1. Petition Signers Engage In Public Speech, Not Anonymous Speech

In our opening brief, we explained that petition signers are not engaged in anonymous political speech. Rather, they are engaged in public speech, by

which we mean speech in which the speaker publicly identifies himself to the government and the public. Br. of Appellants (Secretary's Br.) at 16-22. This is so for several reasons. Under article II, section 1(b) of the Washington Constitution, a voter who signs a referendum petition is exercising the reserved power of the people to directly legislate. In order to petition for a referendum election, a Washington voter must sign the referendum petition, and print his or her name, address, town or city, and county of residence on the petition. Wash. Rev. Code § 29A.72.130, .150. The referendum petition must be submitted to the Secretary of State to determine whether it contains the signatures of the requisite number of legal voters to qualify for an election. Wash. Rev. Code § 29A.72.230. Thus, a voter cannot petition for a referendum election, and a referendum cannot qualify for the ballot, without the petition signers disclosing their identities to the government in petition.

In addition, in the course of the referendum signature-gathering process, signers potentially disclose their identities to an unlimited number of members of the public. They disclose their names and addresses to the sponsor of the measure who submits the petition to the Secretary. Wash. Rev. Code § 29A.72.150. They disclose their names and addresses to signature gatherers. ER 025, 034-035. Petition signers also disclose this information to anyone

who subsequently views the petition, including anyone who subsequently signs the same petition sheet. ER 068-069. Referendum sponsors and signature gatherers may freely use this information about petition signers for any lawful purpose, including campaign and fundraising purposes. *See Bilofsky v. Deukmejian*, 124 Cal. App. 3d 825, 828, 177 Cal. Rptr. 621 (1981) (noting use of initiative petitioner information for campaign purposes).

The Sponsors cannot refute these points. Instead, the Sponsors first assert that we argue petition signers have waived their right to anonymous political speech. Brief of Appellees (Sponsors' Br.) at 12. This is incorrect; we do not argue waiver. We simply argue that in signing the referendum petition, the Sponsors engage in public political speech, not anonymous political speech.

In this respect, the Sponsors are not unlike a United States Senator who rises on the Senate floor, is identified by the presiding officer, and proposes a bill. The Senator has publicly exercised his right to political speech. The fact that the Senator's statements and identity subsequently are published in the Congressional Record does not mean that the Senator has waived his right to anonymous political speech. It simply reflects that the Senator publicly exercised his right to political speech. The same is true with respect to the

Sponsors. They publicly exercise their right to political speech when they sign the referendum petition. That the petition later is available under the Public Records Act does not mean that the Sponsors waived their right to anonymous political speech. It simply reflects that the Sponsors publicly exercised their right to political speech.

Second, unable to refute the public nature of their political speech, the Sponsors argue that the State treats signing referendum petitions as confidential political speech, by which the Sponsors presumably mean anonymous political speech. Sponsors' Br. at 14. The Sponsors base this argument on (1) a misreading of Wash. Rev. Code § 29A.72.230; (2) two opinions of the Attorney General that predate the Public Records Act and accordingly do not reflect the public policy of the State; and (3) ignoring the manifest purpose of the Public Records Act.

The Sponsors first argue that "[t]he Washington elections code contemplates that the names of those who sign referendum petitions should remain confidential", citing Wash. Rev. Code § 29A.72.230. Sponsors' Br. at 14. The Sponsors' reliance on this statute is misplaced not only because its language does not support their claim of confidentiality for petition information, but also because they have never asserted a statutory exemption

from the Public Records Act based on this statute. If, as the Sponsors now suggest, Wash. Rev. Code § 29A.72.230 makes petition signature information confidential, presumably the Sponsors would have asserted such a claim. *See* Wash. Rev. Code § 42.56.070(1) ("Each agency . . . shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.").

Moreover, contrary to the Sponsors' suggestion, Wash. Rev. Code § 29A.72.230 does not make the names and addresses of petition signers confidential. On the contrary, the statute permits public observation of the canvassing and signature verification process. It simply prohibits observers from making a record of the "names, addresses, or other information on the petitions or related records *during the verification process*" and even then, "except upon the order of the superior court of Thurston county." *Id.* (emphasis added). It seems apparent that this time-limited restriction on recording petition information is designed to avoid disruption of the signature verification process, and does not make petition information confidential.

The Sponsors also point to two Attorney General Opinions, one from 1938 and one from 1956, for the proposition that "Washington has long treated petition signatures as confidential information." Sponsors' Br. at 15, Addendum. Each of the Attorney General Opinions upon which the Sponsors relies, predates Washington's Public Records Act (PRA or the Act), which was approved by the people, through an initiative, Initiative Measure No. 276, on November 7, 1972. 1973 Wash. Sess. Laws page nos. 1-31. Thus, neither opinion takes into account the PRA. The PRA, not Attorney General Opinions long predating the Act, reflects the clear public policy of Washington in favor of open access to public records. Wash. Rev. Code § 42.56.030 provides:

> The people of this state . . . in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

The Act makes no exception for referendum petitions.

Finally, in asserting that the State treats signing referendum petitions as confidential speech, the Sponsors misapprehend how the availability of referendum petitions under the PRA serves the purposes of the Act. According to the Sponsors, the purpose of the PRA "is to provide transparency of

government actions, not to provide information on the actions of private citizens engaged in political speech." Sponsors' Br. at 16.

The Sponsors fail to acknowledge that access to signed referendum petitions under the PRA directly serves the PRA's purpose of public oversight of government decision-making. Wash. Rev. Code § 29A.72.240 provides that "[a]ny citizen dissatisfied with the determination of the secretary of state that [a referendum] contains or does not contain the requisite number of signatures of legal voters" may appeal to the superior court and seek a writ of mandate to compel certification or an injunction to prevent certification of the measure to the ballot. Without public access to signed petitions, Washington citizens are not in a position to independently examine whether the Secretary properly certified or properly declined to certify a referendum measure for the ballot. Nor are they in a position to discover and report possible criminal law violations by petition signers who are ineligible to sign. Without access to the names and addresses of signers, members of the public would be unable even to verify the gross number of signatures submitted, whether the State accepted duplicate signatures, or whether the State accepted signatures from persons disqualified from voting. *See* Wash. Rev. Code §§ 29A.72.130, .140.

2. The Sponsors' Effort To Re-characterize The District Court's Rationale For Granting The Preliminary Injunction Fails

In an apparent effort to distance themselves from the District Court's rationale for granting the preliminary injunction—protection from compelled disclosure of anonymous speech—the Sponsors assert that "[t]he District Court did not limit its opinion on protected political speech to anonymous political speech." Sponsors' Br. at 12. The Sponsors posit that the District Court granted the preliminary injunction because the District Court "concluded that referendum signatures are political speech deserving of further First Amendment analysis." Sponsors' Br. at 9.

The Sponsors' effort fails. In its Order Granting Plaintiffs' Motion For Preliminary Injunction, the District Court hardly could be more clear about the nature of the Sponsors' claim and the basis for the Order. "Plaintiffs assert that the signers of the referendum petition are likely entitled to protections under an individual's fundamental, First Amendment right to free speech. [Citation to Plaintiffs' motion omitted.] *The type of free speech in question is anonymous political speech*." ER 008-009. Emphasis added. It is true that the District Court separately examined whether signing referendum petitions is anonymous speech and whether it is political speech. "In this case, the Court must determine whether it is likely that referendum petitions that were submitted to

the Secretary of State should be considered protected political speech." ER 010. The District Court concluded that they should be. "The weight of authority . . . counsels toward the finding that supporting the referral of a referendum is likely protected political speech." ER 011. The District Court then concluded, "[t]herefore, the Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." ER 012. The District Court did not, as the Sponsors now contend, base its preliminary injunction on the rationale that "referendum signatures are political speech deserving of further First Amendment analysis." Sponsors' Br. at 9. The District Court's Order is predicated on its conclusion that signing referendum petitions is *anonymous* political speech.

3. Statutes That Incidentally Affect Public Speech Are Not Subject To Strict Scrutiny

In reaching its conclusion, the District Court relied on cases that dealt with First Amendment challenges to laws requiring the disclosure of anonymous political speech to government or the public. ER 009. In the opening brief, the Secretary argued that these cases did not apply because signing a referendum petition is not anonymous political speech. And for this reason, the PRA is not subject to strict scrutiny. Secretary's Br. at 22-24.

Distancing themselves from the rationale of the District Court that signed petitions constitute anonymous political speech, the Sponsors now assert that "even if this Court was to determine that the District Court incorrectly based its finding that the speech was subject to strict scrutiny solely because it was anonymous political speech, this determination is immaterial." Sponsors' Br. at 13-14. "[T]his Court would apply a strict scrutiny analysis to both protected political speech and anonymous political speech." Sponsors' Br. at 14. Thus, the Sponsors new argument is that any regulation affecting political speech is subject to strict scrutiny, no matter the nature or effect of the regulation. This plainly is incorrect.

For example, in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006), a case involving "core political speech," this Court rejected a First Amendment challenge to an Oregon constitutional provision prohibiting payment of electoral petition signature gatherers on a per-signature basis. The Court did not apply strict scrutiny to the provision. Instead, the Court sustained the provision for the reason that it was reasonably related to important state regulatory interests. *Id*. at 961. The Court explained that:

> Regulations imposing *severe burdens* on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. *Lesser burdens,* however, trigger less exacting review, and a State's

> important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Id., quoting *Arizona Right to Life Political Action Comm.*, 320 F.3d at 1007-08 (quoting *Timmons*, 520 U.S. at 358, 117 S. Ct. 1364) (emphases added and internal quotation marks omitted).

In *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), this Court applied the same intermediate level of scrutiny in sustaining school uniform policies against a First Amendment challenge. "[T]he school uniform policies at issue . . . implicate the First Amendment . . . insofar as they place content-neutral restrictions on students' pure speech and place incidental restrictions on students' expressive conduct." *Id*. at 434. The Court explained:

> [T]he Supreme Court has repeatedly held that a law restricting speech on a viewpoint- and content-neutral basis is constitutional as long as it withstands intermediate scrutiny-i.e., if: (1) "it furthers an important or substantial government interest"; (2) "the governmental interest is unrelated to the suppression of free expression"; and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. (citation omitted).

These decisions fully comport with United States Supreme Court precedents. "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the

suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v.* F.C.C., 520 U.S. 180, 189, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) (upholding provisions of the Cable Television Consumer Protection and Competition Act of 1992 that require cable broadcasters to carry local broadcast television stations on cable television systems.) "To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Narrow tailoring in this context requires that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.*, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

The PRA cannot be fairly characterized as a statute that affects the Sponsors' First Amendment rights at all. The PRA simply is a law of general application that makes public records—i.e., "writing[s] containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency" (Wash. Rev. Code § 42.56.010) "available for public inspection and copying" (Wash. Rev. Code § 42.56.070(1)). The PRA does not prohibit

speech; it does not compel speech; it does not limit speech; and it does not otherwise regulate speech. It is viewpoint and content neutral. To the extent it affects speech at all, it affects it only incidentally. Accordingly, the Act would be subject to intermediate scrutiny under the First Amendment, and there is no basis for the Sponsors' argument that strict scrutiny analysis would apply to the PRA regardless of whether the Act compels disclosure of anonymous speech.

The Sponsors, however, made no First Amendment challenge to the PRA simply on the grounds that it regulates political speech. Their only challenge was that the Act compels disclosure of anonymous political speech. The Sponsors have not, and do not now, argue that the Public Records Act would fail intermediate scrutiny. This is for good reason. The Act plainly furthers important, indeed compelling, state interests in government transparency and accountability. The means chosen—making public records open to the public upon request—is directly tailored to that purpose. It does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broadcasting*, 512 U.S. at 662. As applied to signed referendum petitions, the PRA ensures (1) that Washington citizens have the means necessary to independently evaluate the Secretary's decision whether to certify a referendum to the ballot and to evaluate whether

Washington election laws properly are being enforced, (2) the opportunity to know who has triggered the peoples' direct legislative power, and (3) the opportunity to know who supports the measure, information that may bear upon how Washington voters exercise their power of direct legislation.

4. The Public Records Act Satisfies Strict Scrutiny

Because the PRA does not compel disclosure of anonymous political speech and because, at most, the Act is a content neutral regulation of general application that has only an incidental effect on the Sponsors' speech, it is not subject to strict scrutiny. However, even if application of the Act to referendum signature petitions was subject to strict scrutiny, the Act would satisfy that standard.[1]

[1] The Sponsors argue that the Court should defer to the District Court that the PRA is subject to strict scrutiny and fails to satisfy that standard. Sponsors' Br. at 18, 21. The Sponsors rely on the rule that a court reviewing a preliminary injunction will defer to the district court, if the district court applied the appropriate legal standards governing the issuance of a preliminary injunction, and correctly apprehended the law with respect to the issues underlying the litigation. *Cal. Prolife Council Political Action Comm. v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999). The principle upon which the Sponsors rely does not apply. The District Court applied the wrong legal standard when it concluded that the PRA was subject to strict scrutiny because petition signers engage in anonymous speech. The District Court did not consider the Sponsors' new argument: whether the PRA would survive strict scrutiny (or even if strict scrutiny would apply) if the PRA were evaluated as a law of general application that affects political speech. The Court cannot defer to a determination that the District Court never made. Elsewhere, the Sponsors

The Sponsors offer only unsound arguments why the PRA would not withstand strict scrutiny. First, the Sponsors assert that the government interests served by application of the PRA to referendum signature petitions "are not the sort of 'compelling government interests' previously identified as sufficient to justify infringing on First Amendment rights." Sponsors' Br. at 23. The Sponsors' argument thus erroneously assumes that the government interests supporting application of the PRA to referendum signature petitions must be precisely the same as the government interests that support laws requiring disclosure of campaign contributions with respect to ballot measures. *See* Sponsors' Br. at 23-25 (discussing government interests recognized in the context of laws requiring disclosure of campaign contributions). There is no such limitation on demonstrating a compelling government interest for the PRA.

At the risk of undue repetition, the compelling government interests served by the application of the PRA to signed referendum petitions are twofold. First, the State has a compelling interest in *government transparency*

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recognize this: "[E]ven if this Court was to determine that the District Court incorrectly based its finding that the speech was subject to strict scrutiny solely because it was anonymous political speech, this determination is immaterial . . . . [T]his Court would apply strict scrutiny analysis to both protected political speech and anonymous political speech." Sponsors' Br. at 13-14.

and accountability. In the context of referendum signature petitions, this includes the ability of Washington citizens independently to evaluate whether the Secretary properly determined to certify or not certify a referendum to the ballot. As we have previously explained, Washington election law, Wash. Rev. Code § 29A.72.240, expressly contemplates that any of its citizens "dissatisfied with the determination of the secretary" will have the opportunity to challenge the determination of whether "an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters." Any meaningful opportunity to challenge the Secretary's determination depends on access to signature petitions. Without such access, persons dissatisfied with the Secretary's determination would not be able to evaluate whether the gross number of signature petitions submitted to the Secretary satisfied the constitutional minimum, whether the Secretary counted duplicate signatures, or whether the Secretary counted the signatures of persons who are not eligible to vote under Washington law.

This compelling interest in government transparency and accountability also includes the authority of citizens to determine whether persons who sign referendum petitions in violation of state law are subject to appropriate prosecution—in other words, to evaluate whether state law enforcement

agencies are acting to enforce Washington election-related criminal laws. *See* Wash. Rev. Code § 29A.72.140, requiring referendum petitions to warn of criminal penalties for knowingly (1) signing the same petition more than once, (2) signing when not a legal voter, and (3) making false statements on the petition.

The Sponsors do not even address this compelling state interest in government transparency and accountability. Rather, the Sponsors treat this interest as though it is an interest in preventing actual or perceived corruption, (what the Sponsors call "fraud") arising in the context of financial contributions or expenditures in support of ballot measures. The Sponsors then discount that interest, an interest that the State has not asserted. Sponsors' Br. at 23, 25-26.

The Sponsors also fail to meaningfully engage with the fact that the means employed by the PRA to achieve this compelling State interest are narrowly tailored—in fact, precisely tailored—to serving this government interest. As applied to signed referendum petitions, access to the referendum signature petitions filed with the Secretary, provides the only means for Washington citizens (1) to independently evaluate and challenge the Secretary's decision whether to certify a referendum to the ballot, and (2) to

independently determine whether election laws are being properly enforced. The Sponsors entirely miss the point when they suggest that "[w]ith the fraud interest, the State is adequately served through a less restrictive means—limited government disclosure to allow for signature verification" Sponsors' Br. at 28. *The State's compelling interest is to allow public oversight of government, not to have the government police itself.*

The second compelling government interest served by application of the PRA to referendum signature petitions is providing Washington voters the opportunity to know who has invoked the peoples' direct legislative power, or put differently somewhat differently, who supports the measure. The Sponsors try to discount this interest by equating it with the government interest in compelled disclosure of *de minimis* individual campaign contributions relating to ballot measures. Sponsors' Br. at 31.

Equating the making of *de minimis* campaign contribution with invoking a referendum election is decidedly flawed. The equation discounts the significantly different public interest in the two acts. First, making a campaign contribution is a private act. While it may influence the debate surrounding an election, it cannot cause an election to be held. By contrast, signing a referendum petition is a quintessentially public act. Its very purpose and effect

is to bring about an election by the people to accept or reject a bill passed by the legislature.

Referendum petition signers thus act very little like persons who make campaign contributions, and very much as legislators proposing a bill to a legislative body. The only significant difference is that under article II, section 1 of the Washington Constitution, the legislative body is comprised of the legal voters of Washington, rather than elected representatives of those voters.

It would seem to go without saying that the government has a compelling interest in providing to its citizens, acting in their legislative capacity, as much information as possible about the proposal. "Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures, we think being able to evaluate who is doing the talking is of great importance." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105 (9th Cir. 2003).

This is all the more true in the direct democracy setting because unlike the processes of the Washington Legislature, where bills are subject to hearings, staff analysis, and institutional debate, the opportunity for "citizen legislators" to learn about ballot measures is more limited. In this context, the identity of referendum signers who invoked the election takes on additional

importance. Standing alone, it would provide potentially valuable information to Washington voters. The identities of petition signers also would provide the opportunity to engage in discussion about the reasons for the measure with persons who invoked the referendum process. "We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote." *Cal. Pro-Life Council*, 328 F.3d at 1106.

The Sponsors themselves recognize the importance of informing voters about who supports a referendum petition. The Referendum 71 signature petition contains pictures and short statements of support for the measure from three Washington State Legislators, a pastor, and Larry Stickney, the President of the Washington Values Alliance. Absent public availability of the referendum signature petitions, however, this compelling government informational interest will not be served.

The PRA also is narrowly tailored to providing this information, by making the signature petitions available to the public upon request. The sponsors argue only that the PRA is not narrowly tailored because it is under-inclusive in not requiring disclosure of the identities of other persons who may support or oppose Referendum 71. Sponsors' Br. at 32 n.14. Oddly then, the Sponsors argue that in order to be narrowly tailored, the PRA would have to

compel disclosure of anonymous political speech. This argument is surely misguided. It also serves to highlight the fact that the PRA does not regulate or compel disclosure of private speech at all, and instead simply is a law of general application that provides for the availability of public records.

B. There Is No Basis For Issuing A Preliminary Injunction Under Count II Of The Sponsors' Complaint

Count II of the Sponsors' complaint alleges that providing the Referendum 71 petitions under the Public Records Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. ER 475. The Court should address this claim in this appeal, and reject it.

1. The Court Of Appeals Should Resolve Count II In This Appeal

The Sponsors argue that the Court should not address Count II because, on appeal, this Court "generally will choose to decide only those matters 'inextricably bound up with' the injunctive relief." Sponsors' Br. at 3. And the Sponsors argue that Count I is not inextricably bound up with Court II. *Id* 3-4. The Sponsors have confused two different concepts. "[A]n appeal from an order granting or refusing an injunction brings before the appellate court the entire order[.]" *Burlington N. R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064,

1071 (9th Cir. 1991). The District Court's entire order is before the Court, Sponsors could defend the District Court's Order based on Count II. Indeed, they are doing so. The Secretary has the ability to challenge the alternative ground.

The question of whether one issue is inextricably bound up with another arises from the fact that in an appeal of a preliminary injunction under 28 U.S.C. § 1292(a)(1), the Court's jurisdiction is not limited to the injunction order being appealed. The court also has jurisdiction over other orders or issues that are inextricably bound up with the appeal of the preliminary injunction. For example, *Burlington Northern* involved an appeal of a preliminary injunction. The court concluded that it also had jurisdiction to review an interlocutory district court order—that was not subject to appeal—referring the case to a special master. The court had jurisdiction because "the denial of the preliminary injunction is logically indivisible from the order of reference and we review the propriety of the entire order." *Burlington Northern*, 934 F.2d at 1071.

Thus, Count II is not some other order that must be inextricably bound up with Count I. Moreover, it would be a waste of judicial resources not to review Count II. The District Court heard no testimony, and all the

declarations that were before the District Court are before this Court on appeal. Thus, the Court of Appeals is in the same position as the district court in reviewing the record.[2] It would be a waste of judicial resources for the district court to rule on Count II, and have the losing party appeal to bring the same record back before the Court.

Moreover, the Court should reject the Sponsors' suggestion that, if this Court reverses the District Court with respect to Count I, it extend the injunction so that the District Court can consider the merits of Count II. Sponsors' Br. at 34 n.15. Such an action would likely deprive the Secretary of the benefits of the expedited review granted by this Court. The Secretary sought expedited review and the stay because under the Public Records Act, Washington citizens are entitled to view the names of the individuals who signed Referendum 71 petitions before the November 3rd election. This is the time in which the information is most relevant, and the public will suffer irreparable injury if the information is not disclosed before the election. The election will be held 20 days after the October 14 oral argument. If this Court reverses the District Court with respect to Count I, it is highly unlikely that the

[2] We agree with the Sponsors that the standard of review is de novo. Sponsors' Br. at 34 n.16.

District Court would even consider Count II until after the election—and it would be virtually impossible to have this Court resolve an appeal of a preliminary injunction issued under Count II prior to the election.

2. The Sponsors Count II Claim Fails At The Outset Because The Public Records Act Does Not Compel Disclosure of Private Association or Private Speech

The Sponsors seek to bring themselves within a line of First Amendment cases that protect individuals against government laws that compel disclosure of membership in private organizations, or provide a limited exception from laws that require disclosure of campaign contributions or expenditures. For reasons previously explained, signing a referendum petition is not a private associational activity. It is a public action. And for reasons previously explained, the PRA accordingly does not compel disclosure of private speech by making referendum signature petitions available to the public. *Supra* p. 2-3, 12.

For this reason, Count II of the Sponsors' Complaint fails at the outset.

3. The Sponsors Have Not Established A Reasonable Probability Of Harm To Petition Signers' Associational Rights

The cases upon which the Sponsors rely for their Count II First Amendment claim provide protection from compelled disclosure of private associational or speech activities in order to safeguard First Amendment

associational interests from substantial harm. In *Buckley v. Valeo*, 424 U.S. 1, 72-73, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), declined to recognize a blanket exception from compelled disclosure of campaign financing for all minor parties, but held that an exception could be appropriate where a minor party demonstrates a reasonable likelihood that compelled disclosure would significantly damage the effectiveness of the organization's associational activities. The Court explained that these "movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive." *Id*. at 71. These circumstances do not exist in this case.

To meet the first factor for the issuance of a preliminary injunction—likelihood of success on the merits—the Sponsors must establish "a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassment, or reprisals'"—that will cause substantial harm to associational interests. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88, 103 S. Ct. 416, 74 L. Ed. 2d. 250 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). "The proof may include, for example, specific evidence of past or

present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." *Buckley*, 424 U.S. at 74. The evidence presented by the Sponsors does not establish a reasonable probability of harm to petition signers' associational interests.

The evidence submitted by the Sponsors does not meet the reasonable probability standard for at least two reasons. First, the Sponsors are not a minority group that holds views outside the mainstream, whose effectiveness may depend upon protection from disclosure of private speech or identity.

Whether a group is small and holds views outside the mainstream decidedly is relevant to evaluating the evidence in the reasonable probability standard. In considering the reasonable probability standard, the court considered that the views of the NAACP, in Alabama in the 1950s, the views of the Socialist Workers Party, and the views of the Communist Party were unpopular and their views were outside the mainstream. *Nat'l Ass'n for the Advancement of Colored People (NAACP) v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 1488 (1958) ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, *particularly where a group espouses dissident beliefs*.") (emphasis

added); *Brown*, 459 U.S. at 88 (The Socialist Workers Party is "a small political party with approximately sixty members" whose goal was "the abolition of capitalism and the establishment of a workers' government to achieve socialism."); *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416 (2nd Cir. 1982) ("There is a paramount public interest in maintaining a vigorous and aggressive political system which includes even participants *whose ideologies are abhorrent to that system*.") (emphasis added).

The Sponsors clearly do not hold views that are widely unpopular or outside the mainstream. The Sponsors advocate a traditional definition of marriage between a man and a woman. They oppose same-sex marriage and domestic partnerships between same sex couples. The Sponsors' views are not those of minority dissidents. They are consistent with the law in a substantial majority of the states. Thirty-nine states prohibit same-sex marriage and domestic partnerships. NPR, State By State: The Legal Battle Over Gay Marriage (Sept. 1, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=112448663 (last visited Sept. 28, 2009). Since the Massachusetts Supreme Court ruled that the state ban on same sex marriage violated provisions of their state constitution,

twenty-nine states have held elections and the voters have approved constitutional amendments to prohibit same sex marriage. Pew Forum, States With Voter-Approved Constitutional Bans on Same-Sex Marriage, 1998-2008, *available at* http://pewforum.org/docs/?DocID=370 (last visited Sept. 28, 2009).

Second, given that the Sponsors' views are mainstream, the evidence they have produced does not establish a reasonable probability of harm to the First Amendment associational rights of petition signers.

The Sponsors argue that this case is similar to *Averill v. City of Seattle*, 325 F. Supp. 2d 1173 (W.D.Wash., 2004). In *Averill* the court ruled that campaign finance laws could not be applied to minor party contributor because there was a reasonable probability that the contributors would be subject to harassment. *Averill*, 325 F. Supp. 2d at 1178. According to the Sponsors, in *Averill* there was evidence of numerous crank phone calls and there is similar evidence in this case. Sponsors' Br. at 52. However, in *Averill* the court evaluated the evidence of harassing phone calls in light of the fact that the plaintiffs "evidence of threats, harassment, and reprisals [were] directed against . . . the Freedom Socialist Party[.]" *Averill*, 325 F. Supp. 2d at 1178. The court also relied on "the party's long and consistent history[.]" *Id*. at 1178 n.5.

The Freedom Socialist Party was a small party, with views outside the mainstream, with a history of harassment, not unlike the Socialist Workers Party or the Communist Party. In light of that fact, some harassing phone calls could establish a reasonable probability of significant harm to its associational interests.

This case is different. The Sponsors, and the John Does from California do not represent the position of a small minority or necessarily a minority at all. As the court explained in *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1215 (E.D.Cal. 2009), there "is surely no evidence that the seven million individuals who voted in favor of Proposition 8 can be considered a 'fringe organization' or that their beliefs would be considered unpopular or unorthodox." The court concluded that: "Plaintiffs do not, indeed cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP." *Id.* at 1217. And "Plaintiffs' belief in the traditional concept of marriage, to disagreement, have not historically invited animosity. The Court is at a loss to find any principled analogy between two such greatly diverging sets of circumstances." *Id*.

In the Secretary's opening brief, he explained that the Sponsors' evidence was also insubstantial on its face. Secretary's Br. at 37-41. Although the Sponsors filed 61 declarations, many do not support the claim of threat harassment or reprisal. Twenty involved nothing more than stolen yard signs or ripped off bumper stickers. Secretary's Br. at 37-38. And some of the declarations describe legitimate First Amendment speech by the opponents of Proposition 8. Secretary's Br. at 39-40. This speech by opponents does not constitute threats, harassment or reprisals that can trigger First Amendment based protection from disclosure. As with Proposition 8, the Sponsors' "argument appears to be premised . . . on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. *Just as contributors to Proposition 8 are free to speak in favor of the initiative, so are opponents free to express their disagreement through proper legal means.*" *ProtectMarriage.com*, 599 F. Supp. 2d at 1217. (Emphasis added.)

What was true in California is also true in this case. The "backers of a historically non-controversial belief, seem genuinely surprised to be on the receiving end of such powerful discord. However, such surprise does not warrant an injunction[.]" *Id*. at 1219. The Sponsors' argument "would

establish precedent for any group backing any controversial ballot initiative to come before this Court with evidence of the actions of fringe opposition groups to support their arguments for exemption" from the Public Disclosure Act. *Id.* "Such a holding would thwart the will of [Washington's] government and the will of the electorate to [have government transparency and accountability and to give voters the opportunity to know who has invoked the peoples' direct legislative power]." *Id.*

4. The Sponsors Do Not Meet The Remaining Factors For Injunctive Relief

The Sponsors also fail to meet their burden to establish the remaining factors for injunctive relief. The Sponsors argued that they are likely to suffer irreparable harm because there is a reasonable probability petition signers will be subject to harassment and threats if the Referendum 71 petitions are released. Sponsors' Br. at 53-54. The opposite is also true, since the Sponsors fail to meet the reasonable probability standard, they cannot establish a likelihood of irreparable harm. The Sponsors' argument that the balance of the equities tip in their favor and that the injunction is in the public interest are also premised on meeting the reasonable probability standard. Sponsors' Br. at 54-55. There is no basis for issuing the injunction under Count II.

C. The Court Should Stay The Preliminary Injunction Issued By The District Court

This Court granted the Secretary's motion for expedited review. The Secretary's motion for a stay of the District Court's preliminary injunction is still pending. After oral argument, the Court should stay the injunction so that the Referendum 71 petitions may be released. The November 3rd election will be held 20 days after the October 14th oral argument. Washington citizens are entitled to view the names of the individuals who signed Referendum 71 petitions before the election. This is the time in which the information is most relevant, and the public will suffer irreparable injury if the information is not disclosed before the election.

III. CONCLUSION

For the reasons stated herein, the Court should stay the preliminary injunction issued by the District Court, and reverse the District Court's order granting the injunction.

RESPECTFULLY SUBMITTED this 28th day of September, 2009.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 6,821 words.

September 28, 2009	/s/ William B. Collins
Date	William B. Collins WSBA #785

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2009, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ William B. Collins
William B. Collins